

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	Case No.	CRR No.2071/2021
2	Parties Name	Ojef Khan Vs. State of M.P.
3	Date of Judgment	21/9/2021
4	Bench constituted of	Hon'ble Shri Justice Shailendra Shukla
5	Judgment delivered by	Hon'ble Shri Justice Shailendra Shukla
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Shri S. K. Sharma, learned counsel for the applicant. Shri Sameer Verma and Shri Hemant Sharma, learned Public Prosecutors for the non-applicant – State.
8	Law laid down	Preliminary assessment by Juvenile Justice Board as to whether a Juvenile ought to be tried by Children Court under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 – Assistance of experienced psychologists or psycho social workers or other experts whether mandatory. Held - 'Yes'. The word ' may ' in proviso to Section 15(1) of the Act of 2015 would have to be read as ' shall '. The word "other experts" in the proviso to Section 15(1) of the Act would include Probation Officer in view of Rule 10(a) of Juvenile Justice (Care and Protection of Children) Model Rules, 2016.
9	Significant paragraph numbers	Para 5 to 13, 14.

(Shailendra Shukla)
Judge

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(SINGLE BENCH: HON. MR. JUSTICE SHAILENDRA SHUKLA)

Criminal Revision No.2071/2021

Ojef Khan S/o Muntjir Khan

Aged – 17 years,

Occupation – Student,

Through

Natural guardian – Muntjir Khan,

S/o Abdul Mazid Khan,

Aged – 44 years,

Occupation – Business,

R/o – 49, Samta Nagar Anand Colony, Ratlam,

.... Applicant

Versus

State of Madhya Pradesh

through P.S. Industrial Area,

Ratlam (M.P.)

.... Non applicant

Shri S. K. Sharma, learned counsel for the applicant.

Shri Sameer Verma and Shri Hemant Sharma, learned Public Prosecutors for the non-applicant – State.

Whether approved for reporting :

ORDER

(Passed on 21/9/2021)

1. This criminal revision filed under Section 102 of Juvenile Justice (Care and Protection of Children) Act, 2015 (in short “the Act”) has been filed against the order dated 03.08.2021 passed by the 4th Additional Sessions Judge, Ratlam in Criminal Appeal No.40/2021 as also the order dated 29.06.2021 passed by the Juvenile Court, Ratlam in Criminal Case No.139/2021 whereby the appeal against the order to try the applicant as adult has been dismissed.

2. As per prosecution story, the minor prosecutrix was in contact with another Juvenile co-accused, who took the applicant to the house of prosecutrix whether she was subjected to sexual intercourse first by her acquaintance (other Juvenile co-accused) followed by the applicant. The

applicant also had committed theft of money from the house of prosecutrix by opening up the almirah with the screw driver. Subsequently, the prosecutrix was blackmailed by the present Juvenile applicant and was made to come to a hotel named Ashirwad Hotel where as per pre-hatched conspiracy, a room had been booked and the applicant violated her again in the aforesaid room.

3. The Juvenile Justice Board arrived at a conclusion that the case be tried before the Children Court and passed an order to that effect, which was challenged before the Appellate Court, which has rejected the appeal.

4. Learned counsel for the applicant has submitted that the Juvenile Justice Board was required to take the assistance of experienced psychologist and psychosocial workers while making the preliminary assessment with regard to judging the mental and physical capacity for ultimately passing an order under Section 18(3) of the Act. However, the Board took recourse to the report of the Probation Officer, which is primarily taken into account while considering the bail application of the Juvenile. Learned counsel has further submitted that apart from the Probation Officer's report, the Board has also examined the Juvenile in question-answer format and the questions were of such nature which can be answered by even a child below 16 years of age and such methodology was not adequate for determining as to whether the mental capacity of the Juvenile was such that he could be tried by the Children Court. It is thus submitted that the impugned order is erroneous and the same be set aside and the applicant deserves to be tried before the Juvenile Justice Board itself.

5. Learned Public Prosecutor for the State was also heard who submits that the assistance of psychologist and psychosocial worker is not mandatory as the word '*may*' has been used in Section 15 of the Act. Further, it has been submitted that the reply given by the minor Juvenile co-accused to the questions put to him shows that he has the capability to understand the gravity of the offence and his answers show not only presence of mind but also depict matured mindset.

6. Considered.

7. It would be appropriate to reproduce Section 15 of the Act, which reads as under :-

15. Preliminary assessment into heinous offences by Board :

(1) *In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:*

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) *Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:*

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.

8. It would also be appropriate to reproduce Section 18(3) of the Act, which reads as under :-

18. Orders regarding child found to be in conflict with law :

(3) *Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.*

9. It would further be appropriate to peruse the concerning Rule in the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (in short 'the Rules'). The relevant Rule is 10(A), which is reproduced as under :-

10-A :Preliminary assessment into heinous offences by Board

(1) *The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.*

(2) *For the purpose of conducting a preliminary assessment in case of heinous offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A*

panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.

(3) While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.

(4) Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith.

10. As per Rule 10(A)(2), the panel of such experts may either be provided by District Children Protection Unit or the panel may be accessed independently as well. The only question is whether the word '**may**' has to be read in the same sense or whether '**may**' would be read as '**shall**'.

11. It would be appropriate to draw from the treatise on Principles of Statutory Interpretation authored Justice G. P. Singh. In the aforesaid treatise, in its 14th Edition at page No.523, the author has dealt with connotation of the word '**may**' as under :-

*When permissive words are employed by the Legislature to confer a power on a court to be exercised in the circumstances pointed out by the statute, it becomes the duty of the court to exercise that power on proof of those circumstances. As pointed out by Jervies CJ: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises and its exercise is duly applied for by a party interested and having a right to make that application (**MacDougall v. Paterson (1851) 11 Ch 735**). "The use of permissive words in such cases", said James LJ "is the usual courtesy of Legislature in dealing with the judicature" (**Re. Neath and Brecon Ry. Co. (1874 LR 9 CH 263)**). The words "it shall be lawful" may be used for the purpose of conferring a new jurisdiction which was not lawful for the authority concerned to exercise till then and when a case for the exercise of that jurisdiction is made out, it would be the duty of the said authority to grant the relief and not to refuse to exercise its authority merely at its discretion (**Shelly v. London County Council (1948) 2 All ER 898**) . As observed by Ayyanger J: Though the word 'may' might connote merely an enabling or a permissive power in the sense of the usual phrase 'it shall be lawful', it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a court or other judicial authority (**Ramji Missar v. State of Bihar, AIR 1963 SC 1088**). It has, therefore, been held that the words "an order under this Act may be made by any court" as they occur in section 11 of the Probation of Offenders Act, 1958, imposed a duty to pass an order under the Act subject to conditions and limitations imposed by the Act and that a court had no unfettered discretion in refusing to pass*

an order when an occasion to pass the same arose within the four corners of the Act (Ibid, P.1093). Similarly, the words "the court may pass a decree for eviction", have been construed as not conferring a discretion for refusing to pass a decree where a landlord in a suit has proved the fulfilment of all conditions entitling him to possession, and the court in such cases is bound to pass a decree in his favour in spite of the use of the word "may" (Bhaiya Punjalal v. Bhagvat Prasad, AIR 1963 SC 120). Further, the words "the Magistrate may take cognizance of any cognizable offence" in section 190(1)(b) of the Code of Criminal Procedure, 1973, have been construed to mean "must take cognizance" leaving no discretion to the Magistrate (Sub-Divisional Magistrate, Delhi v. Ram Kali (Mst.), AIR 1968 SC 1). And so, a rule requiring that "the court may engage a counsel to defend the person" in a capital sentence case was held to cast an obligatory duty on the court to provide a counsel if the conditions of the rule were satisfied (Bashira v. State of U.P., AIR 1968 SC 1313) . Similarly, though rule 2-A(i) of the High Court of Karnataka Rules, 1959, provides that the court "may" appoint any advocate from a panel to represent an accused in a criminal case if he inter alia, has insufficient means, the expression "may" was interpreted as laying down a mandatory direction to the court to engage advocate for the accused if the conditions in the rule are satisfied (Chaluvegowda & Ors. vs. State, (2017) 13 SCC 538).

12. From the aforesaid excerpt, it becomes clear that when the word '**may**' is used in an enactment in respect of a Court, the same has to be understood as '**shall**'.

13. Looking to the fact that the order transferring the case of Juvenile between 16 to 18 years of age to the Children Court in itself is a step which needs to be taken very cautiously looking to the far reaching consequences and it would indeed be appropriate that the word '**may**' be read as '**shall**'.

14. Now the question is whether the Probation Officer can be considered to be an expert in the sense as described in the proviso to Section 15 of the Act. The aforesaid proviso requires assistance of experienced psychologists, or psycho social workers or other experts. Rule 10(a) expands the word "other experts" as "other experts who have experience of working with children in difficult circumstances". An expert can be considered to be one, who by way of his profession deals with a specialized subject. Probation Officers are such professionals who on daily basis work with children in difficult circumstances, hence a Probation Officer fits the bill of "other experts" as provided under Section 15 of the Act. Form No.6 which is the social investigation report for

children in conflict with law, is required to be submitted by the Probation Officer. Various columns therein not only take into account social environment but also psychology of the child. Such a report by Probation Officer was considered to be a relevant feedback for obtaining preliminary assessment as per Section 15 of the Act in the judgment of **Ashish Vs. State of Haryana (CRR No.851/2017 High Court of Punjab and Haryana, Chandigarh)**.

15. Broadly speaking, the preliminary assessment report should have shown conclusions regarding the following aspects:-

- (i) Mental capacity to commit such offence.
- (ii) Physical capacity to commit such offence.
- (iii) Ability to understand the consequences of the offence and
- (iv) Circumstances in which the juvenile in question had allegedly committed the offence.

16. The explanation to Section 15 makes it clear that the preliminary assessment is not a trial but is to assess the capacity of such child to commit and understand the consequences of the alleged offence. The Apex Court in the case of **Shilpa Mittal Vs. State of NCT of Delhi and Another in Criminal Appeal No.34/2020 (Arising out of SLP (Cri.) No.7678 of 2019) vide judgment dated 9.1.2020** has observed as under:-

“16..... The explanation makes it clear that the preliminary assessment is not to go into the merits of the trial or the allegations against the child. The inquiry is conducted only to assess the capacity of the child to commit and understand the consequence of the offence. If the Board is satisfied that the matter can be disposed of by the Board, then the Board shall follow the procedure prescribed in summons cases under the Cr.P.C.”

17. In the present case the Board, by way of extra caution, did not totally bank upon the Probation Officer's report but has individually prepared a questionnaire and has put questions in a manner so as to assess the mental capacity of the juvenile. Although the questions relate to the facts of the case but the purpose therein appears to be, as to whether the juvenile understands the gravity of the impugned act and its consequences. The manner in which the juvenile has responded to the questions, shows that he is articulate enough to respond in a manner showing his adequate capacity to understand the

gravity of the offence and consequences thereof and, therefore, he has answered in a manner displaying his innocence and non involvement in the crime.

18. The submission of learned counsel that the aforesaid questions can be answered by even a child below 16 years of age, does not hold water because the purpose of assessment is not as to whether such questions can be answered by a person below 16 years or above 16 years but whether he has the mental and physical capacity to commit such offence and whether he has the ability to understand the consequences of the offence, as also the circumstances in which he allegedly committed the offence.

19. The questionnaire along with consideration of Probation Officer's report has formed the basis of the report of the Juvenile Board, in which all these aspects have duly been considered. A re-visit of Probation Officer's report shows that the applicant lacks discipline, culture, morality, positive thoughts and he has company of friends who are older to his age, there is lack of discipline from family, he does not obey his parents, is more of an independent minded person and due to this, he has fallen into bad company and also into gambling, it has been found that he knows as to what is right and what is not but due to the aforesaid habits he has transcended into the world of crime. He has been shown to be having a robust body.

20. The applicant is decidedly above 16 years of age, which has not been controverted and the offence for which he is accused of, is a heinous offence as per Section 2(33) of the Act.

21. After considering all these aspects, the Juvenile Justice Board has arrived at its conclusion which has rightly been affirmed by the appellate court.

22. It is not as if the applicant would invariably be tried as an adult after his transfer to the Children Court because as per Section 19 of the Act of 2015, the Children's Court may again decide that there is no need for trial of the child as an adult and the Children Court may itself conduct an enquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18 of the Act. Thus, the Act of 2015 embodies multilayered checks and balances in respect of the manner such a juvenile ought to be dealt with.

23. After due consideration, no error of fact or law is found in the impugned orders and, therefore, this revision is liable to be rejected and is accordingly rejected.

(Shailendra Shukla)
Judge

Trilok/-

